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IN THE
COURT OF APPEALS OF INDIANA

JEROME REED,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A04-0702-CR-113
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Judge
Cause No. 02D04-9205-CF-230

September 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Jerome Reed appeals his fifty-year sentence for murder, a felony. Reed raises two issues, which we restate as whether the trial court's finding of aggravating circumstances violated Reed's Sixth Amendment rights under Blakely v. Washington, and whether the trial court improperly found and weighed the aggravating and mitigating circumstances. We conclude that Blakely does not apply to Reed's sentencing proceeding. However, we also conclude that the trial court abused its discretion by finding an improper aggravating circumstance. Therefore, we remand to the trial court with instructions to issue a new sentencing statement.

Facts and Procedural History

On May 14, 1992, Reed shot and killed his girlfriend, Nichelle Ludy. According to Reed, Ludy produced a gun during an argument between the two. Reed attempted to take the gun from her, and in the struggle the gun fired, striking Ludy in the chest. Ludy fell to the ground, and Reed then shot her two more times in the chest. The State charged Reed with murder, a felony, and criminal confinement, a Class B felony. On April 7, 1993, Reed pled guilty to murder pursuant to a plea agreement under which the State dropped the criminal confinement charge and agreed to stand mute at sentencing.

On June 10, 1993, the trial court held a sentencing hearing. Following argument by Reed and Reed's counsel, and a victim impact statement offered by Ludy's mother, the trial court made the following statement:

> I will find that there are no mitigating circumstances, that there are in fact aggravating circumstances. First i[s] the lack of remorse. I had not even

> noticed the reference in the PSI[1] about that although I noted the same thing because it looks to me like Jerome Reed is just looking for excuses. He doesn't even yet acknowledge that he killed Nichelle. There was an accident and the gun went off and then I happened to fire two more times and it resulted in her death. I'm sorry but there's no remorse here. This was no accident. The Defendant has lied to the probation department, perhaps has lied to himself, it was no accident based upon the number of wounds, it was no accident based upon the fact as related in the Affidavit of Probable Cause that Alice Goodland interrupted or attempted to interrupt this whole situation, so we don't even have the excuse that this was some sort of unbridled emotion or passion because he had an opportunity to stop when Alice Goodland came to the door, but yet he prevented Alice from entering or Nichelle from leaving and instead chased Nichelle down the hall and shot her three times.[2] In aggravation further, I feel that any lesser sentence would depreciate the nature of the offense.

Sentencing Transcript at 21-22. The trial court then sentenced Reed to an enhanced sentence of fifty years incarceration.[3] Reed now appeals his sentence.

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[1] The probation officer who compiled the Pre-Sentence Investigation stated that Reed "did not appear remorseful, but indicated that the victim somehow facilitated the crime." Appellant's App. at 42. At the sentencing hearing, Reed's counsel argued that this conclusion was inconsistent with Reed's version of the crime contained in the PSI, in which he stated, "I cannot find the words to express how I am sorry, the word sorry just does not fit." Id. at 40.

[2] The Affidavit of Probable Cause was not included in the record on appeal. It appears that it may have been attached to the PSI at some point. We recognize that the trial court's comments at the sentencing hearing indicate that the affidavit for probable cause may relate a different set of facts than those set out above. However, "the primary purposes of the Affidavit for Probable Cause are to set forth the facts upon which an arrest was made so that the court can determine the lawfulness of the arrest and to provide the State with the information needed to bring charges against the accused." Rhone v. State, 825 N.E.2d 1277, 1284 (Ind. Ct. App. 2005), trans. denied. As former Justice DeBruler recognized, when preparing this affidavit, "an officer would have every reason to be quite selective when choosing what details to include, even exaggerating on occasion. The purpose of the document, after all, is to persuade a judicial officer at a hearing that an arrest was justified." Baran v. State, 639 N.E.2d 642, 649 (Ind. 1994) (DeBruler, J., concurring in result). Given the nature of the affidavit, and the fact that we do not have the document before us, we are reluctant to rely on the trial court's comments in regard to the factual circumstances of the crime. Moreover, if the trial court was not satisfied with the factual basis supplied by Reed at his guilty plea hearing, it was free to elicit further details from Reed or to reject the plea. See Page v. State, 706 N.E.2d 230, 231 (Ind. Ct. App. 1999), trans. denied (recognizing that a trial court has discretion to accept or reject a plea agreement).

[3] At the time Reed committed this crime, the presumptive sentence for murder was forty years. In 1994, the legislature amended the statute to change the presumptive sentence to fifty years. In 1995, the

Discussion and Decision

I. Blakely Claim

Reed argues that the trial court's finding and consideration of aggravating circumstances violated his Sixth Amendment rights under Blakely v. Washington, 542 U.S. 296, 303-04 (2004) (holding that where facts are used to increase a defendant's sentence beyond a statutory maximum, the facts must be either admitted by the defendant or found by a jury beyond a reasonable doubt). Reed's sentence was entered before Blakely was decided, and he filed his appeal as a belated appeal. Therefore, his sentence is not subject to Blakely. Gutermuth v. State, 868 N.E.2d 427, 428 (Ind. 2007).[4] The trial court's consideration of facts not admitted by him was not improper.

II. Finding and Weighing of the Aggravating and Mitigating Circumstances

Under the presumptive sentencing scheme,[5] if the trial court imposes a sentence in excess of the statutory presumptive sentence, it must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances.

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legislature again amended the statute to change the presumptive sentence to fifty-five years. Currently, the advisory sentence for murder is fifty-five years. Ind. Code § 35-50-2-3.

[4] Reed filed his appellate brief before Gutermuth was decided, at which point it was not clear whether Blakely applied to cases such as his. Compare Gutermuth v. State, 848 N.E.2d 716 (Ind. Ct. App. 2006), trans. granted, opinion vacated in relevant part, 868 N.E.2d 427 (holding that Blakely applies retroactively to those who have not exhausted their right to file a belated appeal); with Robbins v. State, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005) (holding that Blakely does not apply retroactively to defendants whose direct appeal was not pending when Blakely was decided).

[5] Our legislature amended our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Because Reed committed his crime before the effective date, the presumptive sentencing scheme applies. See Gutermuth, 868 N.E.2d at 431 n.4.

Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). If we conclude that the trial court abused its discretion in finding aggravating circumstances or failing to find mitigating circumstances, we have several options. We may remand to the trial court with instructions to issue a new sentencing statement. See Cotto v. State, 829 N.E.2d 520, 525. We may also conclude that the error was harmless and affirm the trial court's sentence. Id. Finally, "we may exercise our authority to review and revise the sentence." Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

A. Aggravating Circumstances

1. Depreciate the Seriousness of the Crime

Reed argues, and the State concedes, that the trial court abused its discretion in finding that "a lesser sentence would depreciate the nature of the offense." Appellant's App. at 58. We agree. Our supreme court has held that it is improper for a trial court to use the aggravating circumstance "that imposition of a reduced sentence would depreciate the seriousness of the crime" when the trial court does not consider imposing a reduced sentence. Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997).[6] The PSI recommends that the trial court order at least the presumptive sentence, see appellant's app. at 42, and the trial court's statement contains no indication that the trial court considered imposing a reduced sentence, see sentencing tr. at 22-23. Therefore, we conclude that the trial court abused its discretion in finding this aggravating circumstance.

[6] On the other hand, our supreme court has held that "it is not error to enhance a sentence based upon the aggravating circumstances that a sentence less than the enhanced term would depreciate the seriousness of the crime committed." Mathews v. State, 849 N.E.2d 578, 590 (Ind. 2006).

2. Lack of Remorse

A defendant's lack of remorse can constitute an aggravating circumstance. See Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003). A defendant demonstrates lack of remorse by displaying "disdain or recalcitrance, the equivalent of 'I don't care.'" Cox v. State, 780 N.E.2d 1150, 1158 (Ind. Ct. App. 2002). On the other hand, the fact that a defendant maintains his innocence by making statements akin to "I didn't do it" is not properly considered an aggravating circumstance. Id. Although lack of remorse is a proper aggravator, it is not a weighty aggravator, and instead is considered an aggravator of only modest significance. See Georgopulos v. State, 735 N.E.2d 1138, 1145 (Ind. 2000) ("[T]he lack of remorse is regarded only as a modest aggravator.") In Smith v. State, 655 N.E.2d 532, 540 n.11 (Ind. Ct. App. 1995), trans. denied, this court recognized the modest nature of the lack of remorse, and noted that "lack of remorse alone under these circumstances arguably would not justify a ten-year enhancement [for conspiracy to commit murder]."

Reed argues that the trial court abused its discretion in finding this aggravating circumstance because the record indicates that he was in fact remorseful, and points to several points in the record at which he apologized or expressed regret for his actions. However, as we did not observe Reed when he made these statements, we are not in a position to second-guess the trial court's determination of Reed's credibility. See Mathews v. State, 849 N.E.2d 578, 590 (Ind. 2006); Green v. State, 850 N.E.2d 977, 991 (Ind. Ct. App. 2006), aff'd in relevant part, 856 N.E.2d 703 (recognizing that the trial court "had the ability to observe the defendant directly and listen to the tenor of his voice," and therefore "was in

the best position to determine the sincerity of his alleged remorseful statements").

We recognize that some of the trial court's statements regarding Reed's lack of remorse are unsupported by the record. For example, the statement that Reed "doesn't even yet acknowledge that he killed Nichelle," sentencing tr. at 21, is inaccurate, as Reed pled guilty to murder,[7] admitting that he killed Ludy, and never denied that he fired the fatal shots. The PSI indicates that Reed's version of the events was: "I shot my female companion, Nichelle, while we were struggling over the gun it went off once. Then somehow I fired two more times. This resulted in her death. I can not find the words to express how I am sorry, the word sorry just does not fit." Appellant's App. at 40. Although this statement could be interpreted as an attempt by Reed to explain his actions or reduce his culpability, it indicates no disdain or recalcitrance, and, at least on its face, indicates regret for Ludy's death.

The trial court also commented, "we don't even have the excuse that this was some sort of unbridled emotion or passion." Sentencing Tr. at 22. Although this statement may be true, it comes dangerously close to a comment on the absence of "sudden heat." See Clark v. State, 834 N.E.2d 153, 158 (Ind. Ct. App. 2005) ("To establish that a defendant acted in sudden heat, the defendant must show 'sufficient provocation to engender . . . passion.'" (quoting Johnson v. State, 518 N.E.2d 1073, 1077 (Ind. 1988)). Sudden heat is a mitigating circumstance that distinguishes voluntary manslaughter from murder. See id. We fail to see how the absence of sudden heat either demonstrates Reed's lack of remorse or could be

[7] Indeed, had Reed not acknowledged that he had killed Lundy, the factual basis supporting the guilty plea would be insufficient.

properly considered an aggravating circumstance.[8]

Still, we cannot say that the trial court abused its discretion in finding the aggravating factor of lack of remorse. Our supreme court has indicated that a trial court can consider "its perception of a defendant's remorse or lack thereof." Schiro v. State, 479 N.E.2d 556, 559 (Ind. 1985), cert. denied, 475 U.S. 1036 (1986) (emphasis added). Therefore, the trial court could have based this finding solely on its interpretation of Reed's demeanor and purported statements of remorse. Cf. Manns v. State, 637 N.E.2d 842, 845 (Ind. Ct. App. 1994) (disagreeing with the defendant's argument that "absent evidence in the record, the trial court has no authority to conclude that [he] lacked remorse for his actions"). We conclude that the trial court did not abuse its discretion in finding Reed's lack of remorse to constitute an aggravating circumstance. However, on remand, we urge the trial court to consider our comments with regard to the character and weight of the lack of remorse aggravator.

B. Mitigating Circumstances

Although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Id. The trial court need not give a mitigating factor the same weight as would the defendant. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002).

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[8] We do not mean to imply that the nature and circumstances of a crime, including the defendant's

1. Remorse

Reed argues that the trial court improperly failed to find his remorse as a mitigating circumstance. As discussed above, the trial court did not abuse its discretion in finding that Reed lacked remorse. We are not in a position to reweigh the credibility of Reed's expressions of remorse. Therefore, we are unable to conclude that the trial court abused its discretion in failing to find this mitigating circumstance.

2. Lack of Criminal History

The instant offense was Reed's first criminal conviction other than a misdemeanor conviction for resisting arrest in 1985, seven years before Reed committed this murder. The PSI further indicates that Reed had no juvenile adjudications or criminal arrests.[9] Such a minor and removed criminal history indicates that Reed had been leading a law-abiding life for a significant amount of time before he committed the instant offense. See Ind. Code § 35-38-1-7.1(b)(6) (the court may consider that the defendant had been leading a law-abiding life as a mitigating circumstance). As our sentencing scheme is founded upon principles of reformation, and not vindication, see Ind. Const. art. I § 18, courts should attempt to distinguish offenders with no or minor criminal histories from those with extensive criminal histories. See Bluck v. State, 716 N.E.2d 507, 514 (Ind. Ct. App. 1999); cf. Bacher v. State, 686 N.E.2d 791, 802 (Ind. 1997) (where defendant's criminal history consisted of a public

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state of mind at the time of its commission, could not properly be considered an aggravating circumstance.

[9] "A record of arrest, particularly a lengthy one, may reveal that a defendant has not been deterred even after having been subject to the police authority of the State." Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005). "Such information may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime." Id.

intoxication charge and an A.W.O.L. from the service, and trial court did not find defendant's lack of criminal history to be a mitigating circumstance, supreme court remanded for a new sentencing hearing).

Although the trial court is required to consider a defendant's criminal record at sentencing, it may properly conclude that a lack of criminal history is not entitled to significant mitigating weight. Sipple v. State, 788 N.E.2d 473, 482-83 (Ind. Ct. App. 2003), trans. denied. Although the trial court could have acted within its discretion in finding that Reed's minimal criminal history did not constitute an aggravating circumstance, see Bacher v. State, 722 N.E.2d 799, 804 (Ind. 2000), its complete failure to discuss Reed's criminal history in its oral or written sentencing statement leaves us with the fear that the trial court could have overlooked this factor. Therefore, on remand, we instruct the court to either find Reed's lack of criminal history to be a mitigating circumstance, or explain why it finds that such minimal criminal history does not constitute a mitigating circumstance. See Bacher, 686 N.E.2d at 802.

3. Guilty Plea

Reed next argues that the trial court abused its discretion by failing to find his guilty plea to be a mitigating circumstance. As our supreme court has indicated, "[a] guilty plea demonstrates a defendant's acceptance of responsibility for the crime and extends a benefit to the State and to the victim or the victim's family by avoiding a full-blown trial. Thus, a defendant who pleads guilty deserves to have mitigating weight extended to the guilty plea." Francis v. State, 817 N.E.2d 235, 237-38 (Ind. 2004). However, "not every plea of guilty is

a significant mitigating circumstance that must be credited by the trial court." Trueblood v. State, 715 N.E.2d 1242, 1257 (Ind. 1999), cert. denied, 531 U.S. 858 (2000); see also Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). When a defendant has already received a benefit in exchange for the guilty plea, the weight of the plea may be reduced. See Sensback, 720 N.E.2d at 1165. The plea's significance may also be reduced if the circumstances surrounding the plea indicate that the defendant is not actually taking responsibility for his actions. See id. at 1164-65.

Because of the inherent mitigating nature of a guilty plea, we have recognized that a trial court "generally should make some acknowledgment of a guilty plea when sentencing a defendant." Hope v. State, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005). Here, although the trial court did not mention Reed's guilty plea in its discussion of aggravating and mitigating circumstances, its written sentencing statement does recognize that Reed pled guilty. See Appellant's App. at 58 ("Defendant having entered a plea of guilty, sentencing hearing is held."). Although the better practice would have been for the trial court to have specifically explained why it declined to find Reed's guilty plea to be a mitigating circumstance, the trial court's recognition of the fact the Reed pled guilty leads us to conclude that the trial court did not overlook the plea, and merely found it to be an insignificant circumstance. See Primmer v. State, 857 N.E.2d 11, 16-17 (Ind. Ct. App. 2006), trans. denied. The trial court's statements regarding Reed's failure to accept responsibility could explain its finding the plea to be worthy of insignificant mitigating weight. Cf. Hines v. State, 856 N.E.2d 1275, 1282 (Ind. Ct. App. 2006), trans. denied (trial court properly found guilty plea to be mitigating

circumstance but reduced its weight based on defendant's minimizing his responsibility after the plea). We also note that the State dropped a charge of criminal confinement, a Class B felony, in exchange for the guilty plea. We conclude that the trial court acted within its discretion in failing to find Reed's guilty plea to be a significant mitigating circumstance.

Conclusion

Having found that the trial court found an improper aggravator and may have improperly overlooked a mitigating circumstance, we elect to remand to the trial court with instructions to issue a new sentencing statement[10] consistent with this opinion.

Remanded.

VAIDIK, J., and BRADFORD, J., concur.

[10] The trial court is not required to hold a new sentencing hearing.